REVIEW AND BRIEFS

FILED
FEB - 8 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 16-327

In the Supreme Court of the United States

JAE LEE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Of Counsel:
Paul M. Thompson
A. Marisa Chun
Erika N. Pont
Matthew M. Girgenti
MCDERMOTT WILL & EMERY LLP

Linda A. Klein
Counsel of Record
President
AMERICAN BAR ASSOCIATION
321 North Clark Street
Chicago, IL 60654
(312) 988-5000
abapresident@americanbar.org

Counsel for Amicus Curiae American Bar Association

February 8, 2017

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

In the context of a noncitizen defendant with longtime legal resident status and extended familial and business ties to the United States, whether it is always irrational for a defendant to reject a plea offer notwithstanding strong evidence of guilt when the plea would result in mandatory and permanent deportation.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF ARGUMENT 5

ARGUMENT 6

A. THE ABA CRIMINAL JUSTICE STANDARDS WERE REVISED TO INCORPORATE THE REQUIREMENTS OF *PADILLA* TO PREVENT PREJUDICE TO DEFENDANTS 6

B. THE ABA STANDARDS RECOGNIZE THAT IT IS RATIONAL FOR A DEFENDANT TO CHOOSE TRIAL OVER MANDATORY AND PERMANENT DEPORTATION. 10

C. INCOMPETENT ADVICE ABOUT THE IMMIGRATION CONSEQUENCES OF A PLEA MAY DEPRIVE A DEFENDANT OF THE ABILITY TO PROPOSE ALTERNATIVE SENTENCES THAT AVOID DEPORTATION. 14

D. INEFFECTIVE ASSISTANCE OF COUNSEL HARMS NOT ONLY THE DEFENDANT, BUT THE CRIMINAL JUSTICE SYSTEM AS WELL. 19

CONCLUSION 21

TABLE OF AUTHORITIES

CASES

Commonwealth v. DeJesus,
9 N.E.3d 789 (Mass. 2014) 13

Delgadillo v. Carmichael,
332 U.S. 388 (1947) 11

Hill v. Lockhart,
474 U.S. 52 (1985) 6, 14

INS v. St. Cyr,
533 U.S. 289 (2001) 7, 11, 20

Ng Fung Ho v. White,
259 U.S. 276 (1922) 7

North Carolina v. Alford,
400 U.S. 25 (1970) 6

Ortega-Araiza v. State,
331 P.3d 1189 (Wyo. 2014) 13

Padilla v. Commonwealth,
381 S.W.3d 322 (Ky. Ct. App. 2012) 12, 17

Padilla v. Kentucky,
559 U.S. 356 (2010) . . . . . *passim*

People v. Martinez,
304 P.3d 529 (Cal. 2013), *as modified on denial of reh'g* (Sept. 11, 2013) 12

Roe v. Flores-Ortega,
528 U.S. 470 (2000) 10

Strickland v. Washington,
466 U.S. 668 (1984) 3, 5, 10, 13

United States v. Kwan,
407 F.3d 1005 (9th Cir. 2005) 15, 17

CONSTITUTION

U.S. Const. amend. VI 4, 6, 21

STATUTES

21 U.S.C. § 841(a)(1) 17

RULES

Sup. Ct. R. 37.6 1

OTHER AUTHORITIES

ABA Mission and Goals 1

ABA Report with Recommendation 103E (Criminal Justice Section) (2007) 15

ABA Report with Recommendation 100C (Criminal Justice Section) (2010) ..... *passim*

ABA Report with Resolution 115B (Immigration Law) (2002) 2

ABA Report with Resolution 104E (Criminal Justice Section) (2013) 10

ABA Standards for Criminal Justice, Pleas of Guilty (2d ed. 1982)
14-3.2 7

ABA Standards for Criminal Justice, Pleas of Guilty (3d ed. 1999)
14-1.4 ..... 11, 18
14.3.1 16
14-3.2 7

ABA Standards for Criminal Justice, Prosecution Function and Defense Function (3d ed. 1993)
4-5.1 7

ABA Standards for Criminal Justice: Prosecution Function and Defense Function (4th ed. 2015)
3-1.2 15
3-4.1 16
3-8.1 20
4-5.5 ..... 4, 8, 9, 10
4-6.1 ..... 10, 11

Warren E. Burger, *Introduction: The ABA Standards for Criminal Justice*, 12 Am. Crim. L. Rev. 251 (1974) 3

Rory K. Little, *ABA's Project to Revise the Criminal Justice Standards for the Prosecution and Defense Functions*, 62 Hastings L.J. 1111 (2011) 3, 4

Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, 23 Crim. Just. 10 (Winter 2009) 2, 3

Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. Review of Books, Nov. 20, 2014 15

Jenny Roberts, *Effective Plea Bargaining Counsel*, 122 Yale L.J. 2650 (2013) 18

United States Dep't of Justice, *U.S. Attorneys' Manual*, § 9-73.520 (1997) 18

U.S. Sentencing Comm'n, *2015 Sourcebook of Federal Sentencing Statistics*, Table 10 14

Virginia Legal Ethics Opinion 1876, March 19, 2015, *available at* http://www.vacle.org/opinions/1876.htm 20

INTEREST OF THE AMICUS CURIAE

The American Bar Association ("ABA") is the largest voluntary membership organization of legal professionals in the United States, consisting of more than 400,000 members from all 50 states, the District of Columbia, and other jurisdictions. Its membership includes attorneys in private firms, corporations, non-profit organizations, government agencies, and prosecutorial and public defender offices, as well as judges, legislators, and law professors. In particular, the ABA's membership includes many lawyers who are involved in criminal and immigration matters—prosecutors, defense counsel, immigration lawyers, and judges at state and federal courts of every level.[1]

Since its founding in 1878, and as one of the cornerstones of its mission, the ABA has actively sought to improve the quality of legal representation by "[p]romot[ing] competence, ethical conduct and professionalism."[2] The ABA has worked to protect

---

[1] This brief is filed with the consent of both the Petitioner and the Respondent, and letters reflecting those consents have been lodged with the Clerk of this Court. Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part and that no person or entity, other than the ABA, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Neither this brief nor the decision to file it reflects the views of any judiciary member of the ABA. No member of the ABA Judicial Division Council participated in the adoption or endorsement of the positions in this brief or reviewed the brief prior to filing.

[2] ABA Mission and Goals, *available at* http://www.americanbar.org/about_the_aba/aba-mission-goals.html.

rights guaranteed by the Constitution, including the Sixth Amendment's guarantee of effective assistance of counsel in criminal matters, and to protect the constitutional rights of non-citizens. *See, e.g.*, Brief for the Am. Bar Ass'n as *Amicus Curiae* In Support of Respondents, *Lafler v. Cooper* (No. 10-209) and *Missouri v. Frye* (No. 10-444), *available at* 2011 WL 3151278 (July 22, 2011); ABA Report with Resolution 115B (Immigration Law) (2002), *available at* http://www.americanbar.org/content/dam/aba/directories/policy/2002_am_115b.authcheckdam.pdf.

The consensus views embodied in the ABA Standards for Criminal Justice represent a critical aspect of the ABA's efforts to improve the quality of the criminal justice system. In 1964, the ABA created the Criminal Justice Standards Project under the leadership of then-ABA president and future Justice Lewis F. Powell, Jr. "From the beginning of the project, the Standards have reflected a consensus of the views of representatives of all segments of the criminal justice system." Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, 23 Crim. Just. 10, 14 (Winter 2009).[3] A decade later, Chief Justice Warren E. Burger described the Standards as "a balanced, practical work intended

---

[3] The ABA Standards for Criminal Justice became official ABA policy after approval by vote of the ABA's House of Delegates ("HOD"). The HOD consists of nearly 600 representatives from states and territories, state and local bar associations, affiliated organizations, and ABA sections, divisions, and members, among others. Over the years, the ABA has amended the Standards by the same process. *See* House of Delegates, General Information, *available at* http://www.americanbar.org/groups/leadership/delegates.html.

to walk the fine line between the protection of society and the protection of the constitutional rights of the accused individual." Warren E. Burger, *Introduction: The ABA Standards for Criminal Justice*, 12 Am. Crim. L. Rev. 251, 252 (1974). Since then, the ABA has revised the Standards multiple times through the work of broadly representative task forces consisting of judges, prosecutors, defense lawyers, academics, and lawyers with federal, state, and local perspectives. The Standards process has expanded to include liaisons from the U.S. Department of Justice and the National Association of Attorneys General, among others, to participate in the revision and drafting.

"Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what [performance of counsel] is reasonable." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). While the ABA Standards do not purport to establish the constitutional baseline for effective assistance of counsel, they are "valuable measures of the prevailing professional norms of effective representation, especially as these standards have been adapted to deal with the intersection of modern criminal prosecutions and immigration law." *Padilla v. Kentucky*, 559 U.S. 356, 366–67 (2010); *see also id.* at 377 (Alito, J., concurring) (while "we may appropriately consult standards promulgated by [the ABA]," it is this Court's "task [to] determin[e] what the Constitution commands"). By 2009, state and federal courts had already cited to the ABA Standards more than 3100 times. Marcus, *supra*, at 11. Since *Strickland*, this Court "has relied on the Standards in fashioning and applying constitutional criminal litigation rules at least ten times." Rory K. Little,

ABA's Project to Revise the Criminal Justice Standards for the Prosecution and Defense Functions, 62 Hastings L.J. 1111, 1113 (2011).

Notably, the ABA revised the Standards to reflect this Court's recent jurisprudence in *Padilla* by adding a specific standard to safeguard against the likelihood that non-citizen defendants would suffer prejudice due to erroneous advice regarding the immigration consequences of their decisions. *See generally* ABA Standards for Criminal Justice: Prosecution Function and Defense Function (4th ed. 2015) (hereinafter "Prosecution Function Standard" or "Defense Function Standard"), *available at* http://www.americanbar.org/groups/criminal_justice/standards.html. Because the constitutional question presented in this case has serious implications for fulfilling the Sixth Amendment's promise of effective assistance of counsel, the ABA respectfully submits this brief.

SUMMARY OF ARGUMENT

The question in this case is the one left unanswered after *Padilla*: whether a defendant who received bad legal advice and pleads guilty to a crime—thereby unknowingly subjecting himself to permanent deportation—can be prejudiced by that decision, notwithstanding strong evidence of guilt.

To show prejudice under *Strickland*, a defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Padilla*, 559 U.S. at 366 (quoting *Strickland*, 466 U.S. at 694). The Court of Appeals here in essence adopted a categorical rule—holding that, as a matter of law, Petitioner could *never* show prejudice, because he confronted strong evidence against him and a near-certain conviction at trial. This categorical approach is inconsistent with both this Court's jurisprudence and the ABA Standards. In fact, a defendant who receives incorrect advice about the immigration consequences of a plea can suffer prejudice under *Strickland* in at least two important ways.

First, having received incorrect advice, a defendant cannot make an informed decision about whether to accept a plea offer or to proceed to trial. In this case, Petitioner faced mandatory deportation if he pled guilty to the charged offense—a fact that he did not know at the time he considered the plea offer. With correct legal advice, however, Petitioner would have viewed his options differently, and rationally could have decided to take his chances at trial, rather than lose his best option at staying in the only home he has known. *Second*, with bad legal advice, a defendant is

deprived of his ability to negotiate a more favorable plea agreement in the first instance. Our adversarial system relies upon defense counsel to advise not only their clients, but also the prosecution, about collateral immigration consequences, which leads to an informed negotiation over potential pleas and sentences. Counsel's constitutionally deficient advice about the deportation consequences associated with a plea offer can both limit the number and quality of the "alternative courses of action open to the defendant," as well as preclude the defendant's "voluntary and intelligent choice" among those options. *See Hill v. Lockhart*, 474 U.S. 52, 56 (1985) (citing *North Carolina v. Alford*, 400 U.S. 25, 31 (1970)). The ABA Standards seek to safeguard against such prejudice.

ARGUMENT

A. THE ABA CRIMINAL JUSTICE STANDARDS WERE REVISED TO INCORPORATE THE REQUIREMENTS OF *PADILLA* TO PREVENT PREJUDICE TO DEFENDANTS.

The ABA Standards articulate a set of criteria with respect to a lawyer's duty to provide competent representation—including the duty to advise a non-citizen defendant about immigration consequences during plea negotiations. This Court recognized in *Padilla* that deportation is a uniquely "severe penalty" and held that the Sixth Amendment requires counsel to provide affirmative, competent advice to her client about whether his plea carries a risk of deportation. *See Padilla*, 559 U.S. at 365, 367 ("The weight of prevailing professional norms supports the view that counsel *must* advise her client regarding the risk of

deportation.") (emphasis added) (citing, among other sources, ABA Standards for Criminal Justice, Prosecution Function and Defense Function 4-5.1(a), p. 197 (3d ed. 1993); ABA Standards for Criminal Justice, Pleas of Guilty 14-3.2(f), p. 116 (3d ed. 1999) (hereinafter "Pleas of Guilty Standards")). In doing so, *Padilla* acknowledged the risk of deportation to the non-citizen defendant's decision-making. "Collateral consequences" may be of greater concern to him than a prison sentence or fine, because it may deprive him "of all that makes life worth living." *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) (Brandeis, J.); *accord INS v. St. Cyr*, 533 U.S. 289, 322 n.48 (2001) ("[I]f a defendant will face deportation as a result of a conviction, defense counsel 'should fully advise the defendant of these consequences.'") (quoting Pleas of Guilty Standard 14-3.2, cmt., p. 75 (2d ed. 1982)).

The ABA recognized the significant impact of *Padilla* on the criminal justice system, due to the large number of non-citizens for whom convictions of certain offenses can lead to deportation or removal. *See* ABA Report with Recommendation 100C (Criminal Justice Section) at 1 nn.1, 2 (2010) (hereinafter "Report 100C") (noting that nearly one out of ten defendants is not a United States citizen and that, in areas of high immigrant population such as California, one out of every four persons residing in the state is foreign-born), *available at* http://www.americanbar.org/content/dam/aba/directories/policy/2010_am_100c.authcheckdam.pdf. The ABA also understood the challenges faced by public defender offices in fulfilling *Padilla*'s mandate, due to the lack of attorneys skilled in immigration law in such offices and the financial impossibility of hiring immigration counsel. *See id.* at 10–11. As a result, in

August 2010, the ABA House of Delegates urged local, state, and federal funding, training, and pro bono services to assist lawyers in advising their clients about the immigration consequences of criminal proceedings. *See* ABA Recommendation 100C (Criminal Justice Section) (2010); *see also* Report 100C at 4–5 (discussing "many examples of basic immigration strategies that are designed to give the prosecution what is required, while avoiding making the defendant removable or ineligible for relief from removal").

In 2015, the ABA published Defense Function Standard 4-5.5 ("Special Attention to Immigration Status and Consequences"). In response to *Padilla*, the ABA specifically crafted this new Standard to expand upon the already existing Standards. It states:

> (a) Defense counsel should determine a client's citizenship and immigration status. . . . .
>
> (b) If defense counsel determines that a client may not be a United States citizen, counsel should investigate and identify particular immigration consequences that might follow possible criminal dispositions. Consultation or association with an immigration law expert or knowledgeable advocate is advisable in these circumstances. Public and appointed defenders should develop, or seek funding for, such immigration expertise within their offices.
>
> (c) After determining the client's immigration status and potential adverse consequences from the criminal proceedings, including removal, exclusion, bars to relief from removal, immigration detention, denial of citizenship, and

> adverse consequences to the client's immediate family, counsel should advise the client of all such potential consequences *and determine with the client the best course of action for the client's interests and how to pursue it.*
>
> (d) If a client is convicted of a removable offense, defense counsel should advise the client of the serious consequences if the client illegally returns to the United States.

Defense Function Standard 4-5.5 (emphasis added). The ABA also added other Standards, aimed at preventing or mitigating client prejudice caused by ineffective assistance of counsel. *See, e.g.*, Defense Function Standard 4-5.4 ("When defense counsel knows that a consequence is particularly important to the client, counsel should advise the client as to whether there are procedures for avoiding, mitigating or later removing the consequence . . . . ").

Finally, given that non-citizen juvenile defendants may suffer unique prejudice due to their youth and inexperience, the ABA House of Delegates also passed a resolution: (i) urging courts to ensure that defense counsel advise the juvenile client of the "varying [immigration] consequences that may flow from different dispositions of the case" and the availability of any relief from the same and to seek, when practicable, to minimize adverse consequences, and (ii) encouraging local bar associations and others to train judges, prosecutors, defense lawyers, and legal aid lawyers about the same and to support efforts to provide resources to defense counsel and agencies to provide their juvenile clients effective representation

that satisfies *Padilla*.[4] ABA Resolution 104E (Criminal Justice Section) (2013) at 1–2, *available at* http://www.americanbar.org/content/dam/aba/publishing/abanews/13606040182013_hod_midyear_meeting_104erevised.authcheckdam.pdf.

B. THE ABA STANDARDS RECOGNIZE THAT IT IS RATIONAL FOR A DEFENDANT TO CHOOSE TRIAL OVER MANDATORY AND PERMANENT DEPORTATION.

The prejudice inquiry under *Strickland* requires a fact-specific analysis: the petitioner must convince a fact-finder that a decision to reject the plea bargain and go to trial would have been rational under the circumstances. *Roe v. Flores-Ortega*, 528 U.S. 470, 485–86 (2000) (citing *Strickland*, 466 U.S. at 695–96). The new ABA Defense Function Standard 4-5.5 similarly presumes that one client's willingness to accept certain immigration consequences of a plea may vary from the next—but that it is each client's informed decision to make, depending upon his factual circumstances. Factual circumstances may include family obligations, financial resources, and conditions in the country to which a defendant will be returned. For example, an individual facing deportation to England has a different analysis than an individual facing deportation to South Sudan. *See, e.g.*, Defense

---

[4] For example, ABA practitioners found that some juvenile defendants entered pleas unaware that they were not United States citizens. And, at least one juvenile only learned her actual immigration status years later when detained by immigration authorities. *See* ABA Report with Resolution 104E (Criminal Justice Section) (2013) at 2.

Function Standard 4-6.1(b) ("[C]ounsel should consider the *individual circumstances of the case and of the client*, and should not recommend to a client acceptance of a disposition offer unless and until appropriate investigation and study of the matter has been completed") (emphasis added).

The ABA's Standards and policy guidance, including their client-specific approach, is based upon the practical experiences of ABA members that a rational non-citizen may, under certain circumstances, reject a plea offer guaranteeing mandatory deportation in favor of a jury trial, even in the face of strong evidence of guilt: "[A] plea deal that might otherwise seem attractive—for example, a suspended one-year sentence for misdemeanor theft—may often look considerably different once it is determined that that plea would in fact be deemed an 'aggravated' felony conviction leading to the alien client's swift deportation." Pleas of Guilty Standard 14-1.4, cmt., p. 58 n.96. This Court has similarly recognized that some defendants may accept the risk of a longer sentence in order to plead to a non-deportable offense. *See Padilla*, 559 U.S. at 364, 368 ("[D]eportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes . . . '[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence.'" (quoting *St. Cyr*, 533 U.S. at 322) (second alteration in original)). This calculus makes sense, given the severity of deportation, which is "the equivalent of banishment or exile." *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947).

Broad-based ABA practitioner experience teaches that a rational defendant may decide for a host of reasons to "roll the dice" on a jury to avoid the draconian result of permanent deportation. The defendant (and his counsel) may believe that the court will suppress key evidence or make favorable evidentiary rulings, that his credibility will hold great sway with a jury of his peers, that he can undermine the credibility of a key government agent or informant, or merely that a jury will acquit or hang, especially in the case of a first-time, non-violent drug offender, such as Petitioner. To many defendants, taking a chance at trial is rational when deportation is, at minimum, a life sentence away from family and friends, and possibly entails loss of liberty or even life. As the ABA has previously noted, some "immigrant defendants would trade any concern in order to avoid removal . . . . A defendant can only make this crucial decision if he or she understands the potential criminal and immigration penalties." Report 100C at 6; *accord Padilla v. Commonwealth* ("*Padilla II*"), 381 S.W.3d 322, 330 (Ky. Ct. App. 2012) ("[F]or Padilla, exile is a far worst [sic] prospect than the maximum ten year sentence."). Faced with certain loss, it is rational to throw the "Hail Mary" survival pass, even if the odds of success are low. *See generally People v. Martinez*, 304 P.3d 529, 531, 535 (Cal. 2013), *as modified on denial of reh'g* (Sept. 11, 2013) ("[B]ecause 'the test for prejudice considers what the defendant would have done, that a more favorable result was not reasonably probable is only one factor for the trial court to consider when assessing the credibility of a defendant's claim that he or she would have rejected the plea bargain if properly advised.'").

Here, Petitioner's paramount desire to avoid deportation to South Korea, as well as his first-time offender status and strong familial and business ties to the United States, may well have tipped the balance in favor of trial.[5] *See, e.g.*, *Ortega-Araiza v. State*, 331 P.3d 1189, 1194 (Wyo. 2014) (observing that it was "entirely reasonable" for defendant "to reject the plea and insist on going to trial (or seek a different plea agreement with lesser deportation consequence) as he was facing deportation whether he was convicted pursuant to a plea agreement or as a result of a trial. Better to gamble on an acquittal at trial, than the assured conviction and deportation resulting from a guilty plea"); *Commonwealth v. DeJesus*, 9 N.E.3d 789, 797 (Mass. 2014) ("If an assessment of the apparent benefits of a plea offer is made, it must be conducted in light of the recognition that a non-citizen defendant confronts a very different calculus than that confronting a United States citizen.").

In contrast, the Court of Appeals essentially disregarded the fact-specific nature of the prejudice inquiry and, in effect, established a *per se* rule—that a defendant's low likelihood of prevailing on the merits at trial rendered that factor dispositive in analyzing *Strickland*'s second prong, regardless of the particular context. In other words, it is always irrational for a defendant charged with a deportable offense and facing strong evidence of guilt to proceed to trial rather than take a plea deal requiring deportation, "despite his very strong ties to the United States." Pet. App. 10a. While

---

[5] The government conceded below that Petitioner's trial counsel provided ineffective assistance. Brief for Petitioner at 2, 11; Pet. App. 75a.

strong evidence against a defendant is certainly a relevant factor in his decision making, it is not the only factor. And the weight a defendant assigns to that factor will vary from defendant to defendant.

Trial counsel's ineffective assistance foreclosed Petitioner of the opportunity to freely and intelligently choose whether to exercise his constitutional right to a trial by a jury of his peers. The ABA Standards seek to prevent such deprivations and to ensure that all non-citizen defendants are competently advised about immigration consequences, so that they can make a "voluntary and intelligent choice among the alternative courses of action." *Hill*, 474 U.S. at 56.

C. INCOMPETENT ADVICE ABOUT THE IMMIGRATION CONSEQUENCES OF A PLEA MAY DEPRIVE A DEFENDANT OF THE ABILITY TO PROPOSE ALTERNATIVE SENTENCES THAT AVOID DEPORTATION.

The ABA Standards and policy guidance also recognize that criminal cases are overwhelmingly resolved by plea negotiations and that such negotiations can be an ongoing and dynamic process. When the Court decided *Padilla*, ninety-five percent of cases were resolved by plea bargain. *Padilla*, 559 U.S. at 372 n.13. That number has increased, at least in federal cases. *See* U.S. Sentencing Comm'n, *2015 Sourcebook of Federal Sentencing Statistics*, Table 10 (97.1% of cases resolved by plea bargain). The plea bargaining process is guided not only by defense counsel's duty to his client, but also by the prosecutor's ability to consider holistically the facts of an individual defendant's situation, once he or she is made aware of

those facts. *See* Prosecution Function Standard 3-1.2(b) ("The duty of the prosecutor is to seek justice . . . not merely to convict.").[6] Prosecutors also have an interest in the finality of convictions and ensuring that the correct result is reached in all cases.

Today's criminal justice system bears little relationship to what the Founding Fathers envisioned, with the jury trial as its centerpiece. In reality, "our criminal justice system is almost exclusively a system of plea bargaining, negotiated behind closed doors and with no judicial oversight." Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. Review of Books, Nov. 20, 2014 (advocating the involvement of magistrate judges in the plea bargaining process, due to the arbitrary nature of the "current system of prosecutor-determined plea bargaining"). Thus, the Sixth Circuit's premise that the only options available to Petitioner were a binary choice between the offered plea agreement and trial was particularly flawed. Pet. App. 7a–8a; *cf. United States v. Kwan*, 407 F.3d 1005, 1017–18 (9th Cir. 2005), *abrogated on other grounds by Padilla*, 559 U.S. at 356 (noting that non-citizen defendant "could have gone to trial or renegotiated his plea agreement to avoid deportation; he could have pled guilty to a lesser charge, or the parties could have stipulated that Kwan would be sentenced to less than one year in prison").

---

[6] *See also* ABA Report with Recommendation 103E (Criminal Justice Section) (2007) (urging federal, state, and local governments to assist defense counsel and prosecutors "in advising clients of the collateral consequences of criminal convictions during representation"), *available at* http://www.americanbar.org/content/dam/aba/directories/policy/2007_my_103e.authcheckdam.pdf.

Indeed, the ABA Standards recognize that competent counsel must at least understand the need to propose an alternative sentence that does not involve deportation, when available. Defense counsel and prosecutors are encouraged to consult with each other about such a disposition. *See* Prosecution Function Standard 3-4.1(a) ("The prosecutor should have and make known a general policy or willingness to consult with defense counsel concerning disposition of charges by plea."); Pleas of Guilty Standard 14-3.1, cmt., p. 105 ("[A] refusal to negotiate with defendants is inconsistent with the ABA's . . . Standards and with efficient judicial administration.").

ABA policy further acknowledges that "[i]n many cases it is possible to identify a plea . . . that is roughly equivalent to the one charged but is safer for immigration purposes." Report 100C at 4. Defense counsel can negotiate a plea to a different charge or one requiring more incarceration yet avoiding deportation. *See* Pleas of Guilty Standard 14-3.1(c), p. 101. For example, in federal court, defense counsel often negotiate a sentence of one year plus one day, rather than only one year, which makes the defendant eligible for "good time" credits and an early release. *See* Report 100C at 4. However, for the non-citizen defendant, such a sentence may trigger harsh deportation consequences. Instead, if a person has been charged with an offense that becomes an aggravated felony only if the court imposes a sentence of one year or more, he may request a sentence of 364 days, thereby preserving

the possibility for relief from deportation.[7] *See id.* On remand from this Court, the Kentucky Court of Appeals acknowledged a similar possibility in Padilla's case. *Padilla II*, 381 S.W.3d at 330 ("[H]ad the immigration consequences of Padilla's plea been factored . . . trial counsel may have obtained a plea agreement that would not have the consequence of mandatory deportation."); *accord Kwan*, 407 F.3d at 1017 ("[H]ad counsel and the court been aware that a nominally shorter sentence would enable [the defendant] to avoid deportation, there is a reasonable probability that the court would have imposed a sentence of less than one year.").

Defense counsel who advises her client competently can shape the dialogue with prosecutors and help develop alternative charging or plea options that avoid deportation, thereby aiding the defendant and, oftentimes, other interests of justice.

> By bringing deportation consequences into this [plea bargaining] process, the defense and prosecution may well be able to reach

---

[7] In Petitioner's case, Mr. Lee pled guilty to one count of unlawful possession with intent to distribute MDMA (ecstasy), in violation of 21 U.S.C. § 841(a)(1). The district court sentenced Mr. Lee to a period of incarceration of twelve months and one day. *Lee v. United States*, Petition for Writ of Certiorari ("Pet.") at 7; *accord* Pet. App. 51a, 57a. Petitioner's defense counsel testified that he was not aware that a guilty plea to a violation of Section 841(a)(1) would result in mandatory deportation. *Id.* at 54a. Because counsel was not aware of this fact, he apparently did not explore with the government whether Petitioner could plead guilty to a different, non-deportable crime. (Any conviction to the original charge, an aggravated felony, would have required deportation.)

> agreements that better satisfy the interests of both parties. . . . Counsel who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence.

Padilla, 559 U.S. at 373; *see also generally* Pleas of Guilty Standard 14-4.1, p. 141 (noting that diversion may be appropriate when "the interests of justice will be served," including when "the needs of the offender and the government can be better met outside the traditional criminal justice process"); Jenny Roberts, *Effective Plea Bargaining Counsel*, 122 Yale L.J. 2650 (2013) (discussing *Padilla* and other cases and analyzing the role of defense counsel in plea negotiations).

Defense counsel's lack of understanding or misunderstanding about immigration consequences also can limit a defendant's options, because a prosecutor may not even consider plea options which avoid deportation, unless defense counsel raises the issue. *See, e.g.*, United States Dep't of Justice, *U.S. Attorneys' Manual*, § 9-73.520 (1997) (for immigration violations, federal prosecutors should seek the deportation of all deportable non-citizen criminals, absent extraordinary circumstances). ABA guidance supports the view that it is not always irrational for a defendant to reject a plea offer requiring deportation, despite strong evidence of guilt, because the defendant

may very well have sought an alternative sentence that avoids deportation.

D. INEFFECTIVE ASSISTANCE OF COUNSEL HARMS NOT ONLY THE DEFENDANT, BUT THE CRIMINAL JUSTICE SYSTEM AS WELL.

As this Court observed in *Padilla*, the impact of incompetent counsel is far broader than just harm to the defendant—it harms the adversarial criminal justice system itself:

> It is our responsibility under the Constitution to ensure that no criminal defendant—whether a citizen or not—is left to the "mercies of incompetent counsel." To satisfy this responsibility, we now hold that counsel must inform her client whether his plea carries a risk of deportation. *Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less.*

Padilla, 559 U.S. at 374 (emphasis added) (citations omitted).

Despite the different criminal justice experiences and perspectives reflected in the ABA's diverse membership, there is a consensus that the failure to inform defendants of the risk of deportation associated with plea bargains also diminishes the fairness and credibility of our criminal justice system. *See generally* Recommendation 100C ("[I]n many cases a criminal defender armed with an analysis can obtain a criminal

disposition that will satisfy the prosecution, while creating no or at least less severe adverse immigration consequences."); *accord Padilla*, 559 U.S. at 373 ("[I]nformed consideration of possible deportation can only benefit both the State and non-citizen defendants during the plea-bargaining process."). Resource-challenged prosecutorial agencies may welcome accurate information about immigration consequences from defense counsel, to negotiate alternative sentences that promote finality and serve the goals of deterrence and punishment, but impose a lesser burden on the courts and sister agencies. *See generally St. Cyr*, 533 U.S. at 322 (noting that a plea agreement grants the government numerous "tangible benefits, such as promptly imposed punishment without the expenditure of prosecutorial resources"). Indeed, since *Padilla*, some states have issued guidance that prosecutors commit ethical misconduct if they do not inform an unrepresented defendant about the need to obtain legal advice regarding immigration law consequences under certain circumstances. *See, e.g.*, Virginia Legal Ethics Opinion 1876, Mar. 19, 2015, *available at* http://www.vacle.org/opinions/1876.htm. Adopting the Sixth Circuit's approach—namely, that a first-time offender and long-time legal permanent resident with very strong ties to the United States cannot establish prejudice solely because "[t]he case against him was very strong"—would harm the criminal justice system's interests in fairness and finality which the ABA Standards aim to promote. *See, e.g.*, Prosecution Function Standard 3-8.1 (prosecutor should not defend a conviction if she believes that a miscarriage of justice associated with the conviction has occurred).

This Court can only fulfill the Sixth Amendment's promise to provide the accused, in all criminal prosecutions, "the Assistance of Counsel for his defen[s]e" by recognizing the reality that, in some circumstances, the noncitizen defendant can and will rationally choose to reject a plea offer which would result in permanent deportation. It is the defendant's voluntary and intelligent choice to make. Our Constitution demands no less.

CONCLUSION

Amicus curiae American Bar Association respectfully urges this Court to reverse the Sixth Circuit's decision.

Respectfully submitted,

Linda A. Klein
Counsel of Record
President
AMERICAN BAR ASSOCIATION
321 North Clark Street
Chicago, IL 60654
(312) 988-5000
abapresident@americanbar.org

Of Counsel:
Paul M. Thompson
A. Marisa Chun
Erika N. Pont
Matthew M. Girgenti
MCDERMOTT WILL & EMERY LLP

Counsel for Amicus Curiae
American Bar Association